No. 92-593

Supreme Court, U.S.
FILED
APR 21 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1992

MIGUEL DE GRANDY, et al.,
Appellants,

v.

T. K. WETHERELL, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

APPELLANTS' BRIEF

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
PATTON, BOGGS
& BLOW
P. O. Drawer 20004
Greensboro, NC 27420
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
RUMBERGER, KIRK
& CALDWELL
P. O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
FERRELL, CARDENAS, FERTEL
& MORALES
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
*Counsel of Record

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

I. Upon a finding of a violation of Section 2 of the Voting Rights Act, can a district court decline to provide for a complete remedy of that violation?

II. Upon establishing liability under Section 2 of the Voting Rights Act, what remedial procedure and standards should a district court employ to insure Fourteenth and Fifteenth Amendment guarantees are not eviscerated by deference to state redistricting policies?

LIST OF PARTIES

The appellants are: Miguel De Grandy, Mario Diaz-Balart, Andy Ireland, Casimer Smericki, Van B. Poole, Terry Ketchel, Roberto Casas, Rodolfo Garcia, Jr., Luis Rojas, Lincoln Diaz-Balart, Javier Souto, Justo Luis Poso, Alberto Cardenas, Rey Velazquez, Luis Morse, Alberto Gutman, Karen E. Butler, Sgt. Augusta Carter, Jean Van Meter, Anna M. Pinellas, Robert Woody, Gina Hahn, Bill Petersen, Terry Kester, Margie Kincaid, and Brooks White. The appellees are: T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Gwen Margolis, in her official capacity as President of the Florida Senate, Lawton Chiles, in his official capacity as Governor of the State of Florida, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee, Jim Smith, in his official capacity as Secretary of State of Florida and Robert Butterworth, in his official capacity as Attorney General of Florida.

In the consolidated case of Florida State Conference of NAACP Branches, et al. v. Chiles, No. 92-40131-WS, the plaintiffs were: Florida State Conference of NAACP Branches, T.H. Poole, Sr., Whitfield Jenkins, Leon W. Russell, Willye Dennis, Turner Clayton, Rufus Brooks, Victor Hart, Kerna Iles, Roosevelt Walters, Johnnie McMillian, Phyllis Berry, Mary A. Pearson, Mable Butler, Iris Wilson, Jeff Whigham, Al Davis, Peggy Demon, Carlton Moore, Richard Powell, Neil Adams, Leslie McDermott, Robert Saunders, Sr., Irv Minney, Ada Moore, Anita Davis, and Calvin Barnes. The defendants were: Lawton Chiles, in his official capacity as Governor of Florida, Jim Smith, in his official capacity as Secretary

of State of Florida, Robert Butterworth, in his official capacity as Attorney General of Florida, Gwen Margolis, in her official capacity as President of the Florida Senate, T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, and Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee.

In the consolidated case of United States v. Florida, No. 92-40220-WS, the plaintiff was the United States of America, and the defendants were: State of Florida, T.K. Wetherell, Speaker of the Florida House of Representatives; Gwen Margolis, President of the Florida Senate; Lawton Chiles, Governor of the State of Florida; Robert Butterworth, Attorney General for the State of Florida; Peter R. Wallace, Chairman of the House Reapportionment Committee; Jack Gordon, Chairman of the Senate Reapportionment Committee; and Jim Smith, Secretary of State for the State of Florida.

The court below also granted the following persons and organizations leave to intervene or act as amicus curiae: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; the Coalition of Hispanic Women; and Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William; State Representatives Darryl Reaves, Corinne Brown and James T. Hargrett; United States Representative Jim Bacchus; and

United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

Cross appeals have been filed by the following parties: T.K. Wetherell, Peter R. Wallace, Lawton Chiles, Jim Smith, Robert Butterworth, the State of Florida (92-519) and the United States of America (92-767). These appeals have been consolidated with this case by order of this Court dated February 22, 1993.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Pre-Trial Proceedings.	2
II. Trial Proceedings In The District Court.	8
SUMMARY OF ARGUMENT	13
ARGUMENT	15
III. UPON A FINDING OF A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT, A DISTRICT COURT MUST RENDER A COMPLETE REMEDY, PURSUANT TO THE REMEDIAL PROCEDURES AND STANDARDS ESTABLISHED BY THIS COURT TO ENSURE THAT FOURTEENTH AND FIFTEENTH AMENDMENT GUARANTEES ARE NOT EVISCERATED.	15
A. The equitable duty of a district court to provide a complete remedy for a violation of the Voting Rights Act is	

explicit in this Court's holdings, which have been codified in amended Section 2. 16

B. This Court has established a remedial procedure for district courts to employ upon a finding of a Section 2 violation. 22

C. This Court has developed judicially manageable standards by which the completeness of Section 2 remedies can be measured. 26

IV. THE DISTRICT COURT'S ABDICATION OF ITS REMEDIAL RESPONSIBILITY LED IT TO ADOPT AN ILLEGAL, DISCRIMINATORY STATE PLAN AND IGNORE THE FEASIBILITY OF AN "IDEAL REMEDY." 29

A. The district court's deference to the state plan that violated Section 2 of the Voting Rights Act was an error of law. 29

B. The District Court placed a novel burden of proof upon the appellants, which is not required by the Voting Rights Act. 33

C. There is no proper record evidence to support the District Court's conclusion that its "ideal" remedy -- the

elimination of all dilution of both the Hispanic and African-American communities -- was not possible. 34

D. The De Grandy Appellants presented a plan that provided a complete remedy. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Page

Cases

Arizonans for Fair Representation v. Symington,
No. Civ. 92-256-PHX-SMM
(D. Ariz. April 30, 1992) 28

Chapman v. Meier,
420 U.S. 1 (1975) 19

Connor v. Finch,
431 U.S. 407 (1977) 19, 26, 29

DeBaca v. County of San Diego,
794 F. Supp. 990 (S.D. Cal. 1992) 32

Dillard v. Crenshaw County,
831 F.2d 246 (11th Cir. 1987) 18

Edge v. Sumter County School District,
775 F.2d 1509 (11th Cir. 1985) 18

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984),
aff'd in part and reversed in part
sub nom., Thornburg v. Gingles,
478 U.S. 30 (1986) 18, 19, 23, 24

Good v. Austin,
800 F. Supp. 557 (E. & W.D. Mich. 1992) . 28

Green v. County School Bd.,
391 U.S. 430 (1968) 17

Growe v. Emison,
___ U.S. ___, No. 91-1420
(February 23, 1993) (WESTLAW
42842 (U.S.Minn.)) 15, 18, 20, 27

Hastert v. State Bd. of Elections,
777 F. Supp. 634 (N.D. Ill. 1991) 28

In re Constitutionality of Senate Joint
Resolution 2-G Special
Apportionment Session 1992,
597 So. 2d 276 (Fla. 1992) 6, 8, 26

In re Illinois Congressional Districts
Reapportionment Cases,
No. 81 C 1395, slip op. (N.D. Ill.
1981), aff'd mem sub nom.,
Ryan v. Otto, 454 U.S. 1130,
102 S. Ct. 985, 71 L. Ed. 2d 284
(1982) 17, 19

Kilgarlin v. Martin,
252 F. Supp. 404 (S.D. Tex. 1966),
rev'd in part and remanded sub nom.,
Kilgarlin v. Hill, 386 U.S. 120
(1967) 3

Kirksey v. Board of Supervisors,
554 F.2d 139 (5th Cir.) (en banc),
cert. denied, 434 U.S. 968 (1977) 17, 20

Louisiana v. United States,
380 U.S. 145 (1965) 16, 17

McGhee v. Granville County,
860 F.2d 110 (4th Cir. 1988) 18

Meek v. Metropolitan Dade County,
805 F. Supp. 958 (S.D. Fla. 1992) 24

Meek v. Metropolitan Dade County,
908 F.2d 1540 (11th Cir. 1990) 20

North Carolina State Bd. of
Educ. v. Swann,
402 U.S. 42 (1971) 17

Reynolds v. Sims,
377 U.S. 533 (1964) 22

Roman v. Sincock,
377 U.S. 695 (1964) 19, 28

Rybicki v. State Board of Elections,
574 F. Supp. 1082 (N.D. Ill. 1982) 20

Shaw v. Barr,
808 F. Supp. 461 (E.D.N.C. 1992),
appeal pending as Shaw v. Reno,
No. 92-357 15

Thornburg v. Gingles,
478 U.S. 30 (1986) . . . . . passim

United States v. Dallas County Commission,
850 F.2d 1433 (11th Cir. 1988) 18, 21

United States v. Florida, et al.,
TCA 92-40220-WS 7

Upham v. Seamon,
456 U.S. 37 (1982) 30

Voinovich v. Quilter,
61 U.S.L.W. 4199 (U.S. March 2,
1993) (No. 91-1618) 15, 18, 20, 27

Whitcomb v. Chavis,.
403 U.S. 124 (1971) 27

White v. Weiser,
412 U.S. 783 (1973) 23

Wilson v. Eu,
823 P.2d 545 (Cal. 1992) 27, 28

Wise v. Lipscomb,
437 U.S. 535 (1978) 22

Statutes

28 C.F.R. Part 51 (1991) 6

28 U.S.C. § 2284 4

28 U.S.C. § 1253 2

42 U.S.C. § 1973 . . . . . passim

Article III, Section 16 of the Constitution
of the State of Florida 2, 3, 4, 5

Fed. R. Civ. P. 53 4

Other

S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 208 18

No. 92-593

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MIGUEL DE GRANDY, et al.

Appellants,

v.

T. K. WETHERELL, et al.

Appellees.

On Appeal From The United States District Court For The Northern District Of Florida Tallahassee Division

APPELLANTS' BRIEF

OPINIONS BELOW

The July 2 judgment and July 17, 1992, opinion of the three-judge court for the Northern District of Florida, Tallahassee Division, which implemented redistricting of the state legislative districts in Florida, are unreported. Each is set out in the Appendix to the Appellants' Jurisdictional Statement (App. 1-92).

JURISDICTION

The judgment of the three-judge court for the Northern District of Florida, Tallahassee Division, was entered on July 2, 1992. Appellants filed notice of appeal on July 31, 1992. See J.S. App. 98.

This appeal was docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. Probable jurisdiction was noted by this Court on February 22, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of, and the First, Thirteenth, Fourteenth and Fifteenth Amendments to, the Constitution of the United States, Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973(c), and Article III, Section 16 of the Constitution of the State of Florida, the pertinent texts of which are set out in the Appendix to the Jurisdictional Statement (App. 93-97).

STATEMENT OF THE CASE

I. Pre-Trial Proceedings.

On January 14, 1992, Miguel De Grandy, an Hispanic member of the Florida House of Representatives, and other registered voters (the "De Grandy Appellants") filed a complaint in the District Court for the Northern District of Florida, Tallahassee Division, challenging the validity of Florida's congressional and state legislative

districts. The De Grandy Appellants alleged that the then-existing districts violated both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq., and further alleged that there was an impasse in the legislative process to adopt remedial districts. The De Grandy Appellants urged the District Court to redistrict and reapportion[1] the state. The District Court, however, declined to take preliminary action, giving the Florida legislature an opportunity to adopt remedial redistricting plans.

Subsequently, the De Grandy Appellants amended their original complaint and alleged specific violations of the Equal Protection Clause (the "one-person, one-vote" principle) and of the Fifteenth Amendment to the United States Constitution.[2] The plaintiffs also alleged violations

---

[1] The term "reapportionment" properly refers to the redistribution of seats in established units of government such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Kilgarlin v. Martin, 252 F. Supp. 404, 410 n.1 (S.D. Tex. 1966), rev'd in part and remanded sub nom., Kilgarlin v. Hill, 386 U.S. 120 (1967). Because the Constitution of Florida, Article III, Section 16(a) permits the legislature to change the number (within a range) of House and Senate seats after each decennial census, it is technically appropriate to refer to the Florida redistricting process as "reapportionment." This term is used throughout this Brief for purposes of consistency with the District Court opinion.

[2] The parties stipulated that impermissible population imbalances in the districts existed at the time of the commencement of this action. According to the 1990 census, the total population of the state of Florida was 12,937,926, an increase of 3,213,602 persons since 1980. To achieve equal population districts in the forty-member Senate, each district would ideally contain 323,448 persons. To achieve equal population districts in the one hundred twenty-member House, each

of Sections 2 and 5 of the Voting Rights Act because the districts diluted the voting strength of Hispanic voters. On March 27, 1992, pursuant to 28 U.S.C. § 2284, a three-judge court was convened to hear the challenge.

The Florida legislature began its regular session on January 14, 1992; the session ended on March 13, 1992, without adopting a state reapportionment plan. On March 27, 1992, pursuant to a renewed motion by the De Grandy Appellants, the three-judge panel exercised jurisdiction and issued a scheduling order. See Juris. Statement App. 12. Consequently, on April 2, 1992, the Governor of Florida called a special redistricting and reapportionment session of the Florida legislature pursuant to Article III, § 16(a) of the Florida Constitution.

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the court appointed United States District Judge C. Clyde Atkins as Special Master for both congressional and legislative reapportionment. On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of NAACP Branches (the "NAACP") and individual African-American voters. The court ordered bifurcation of the congressional redistricting and state reapportionment hearings.[3] On April 10, 1992,

---

district would ideally contain 107,816 persons.

[3] Judge Atkins concluded hearings on congressional redistricting and issued his report and recommendation. The district court considered the parties' objections, conducted a hearing and issued its judgment on May 29, 1992. No appeal has been filed with respect to that judgment.

On the basis of the evidence adduced during the congressional hearings, Judge Atkins recommended, and the court below adopted, a

the legislature adopted Senate Joint Resolution 2-G (hereinafter "SJR 2-G") reapportioning state House and Senate districts. Pursuant to Section 5 of the Voting Rights Act, the Attorney General of the State of Florida submitted SJR 2-G to the United States Department of Justice for preclearance.

On April 13, 1992, pursuant to Fla. Const. Art. III, § 16(a), the Attorney General of the State of Florida petitioned the Florida Supreme Court for a declaratory judgment to determine the validity of the apportionment plan.[4] On May 13, 1992, the Florida Supreme Court validated SJR 2-G, subject to the right of any interested party to file a subsequent challenge under Section 2 of the

---

congressional plan that created two Hispanic majority districts (with 67.5% Hispanic voting age population ["HVAP"] and 70.6% HVAP, respectively) and two Black majority districts (with 54.0% Black voting age population ["BVAP"] and 50.6% BVAP, respectively).

[4] Under the Constitution of the State of Florida, if the legislature fails to apportion legislative districts within two years of each federal decennial census, the governor is required to convene a special apportionment session of the legislature, and it is the "mandatory duty" of the legislature to adopt a joint resolution of apportionment. Fla. Const. Art. III, § 16(a). See Juris. Statement App. 106. The constitution further requires the state attorney general to petition the Florida Supreme Court for a declaratory judgment to determine the validity of the apportionment plan. Id.

Under state law, because the proceeding before the Florida Supreme Court is to determine only the facial validity of the apportionment plan, proceedings are conducted on an accelerated schedule without discovery by the parties and without the introduction of evidence. If the Florida Supreme Court determines that the legislative apportionment is facially valid, the plan must be precleared by the Department of Justice pursuant to 42 U.S.C. § 1973(c) (Section 5 of the Voting Rights Act) before it may be implemented.

Voting Rights Act.[5] In re Constitutionality of Senate Joint Resolution 2-G Special Apportionment Session 1992, 597 So. 2d 276 (Fla. 1992). As a result of the facial validation, and pending the Section 5 preclearance process, the district court stayed its proceedings -- including hearings scheduled by the Special Master regarding state reapportionment -- until May 27, 1992. See Juris. Statement App. 13.

On June 16, 1992, the Attorney General of the United States precleared the Florida House of Representatives redistricting plan, but refused to preclear the Senate plan with regard to the Hillsborough County area.[6]

On June 17, 1992, the Florida Supreme Court requested that the legislature adopt a reapportionment plan that would take into consideration the objections of the Justice Department. Its order concluded that: "In the event the Legislature declares its inability to adopt a reapportionment plan or fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse

[5] In carrying out its quasi-legislative function of conducting a facial review of SJR 2-G, the Florida Supreme Court explicitly declined to undertake a complete Section 2 analysis of SJR 2-G, stating, "[i]t is impossible for us to conduct a complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, section 16(c) [of the Florida constitution]." In re Constitutionality of Senate Joint Resolution 2-G, 597 So. 2d at 282 (1992).

[6] Five Florida counties are subject to the preclearance requirements of Section 5: Collier, Hardee, Hendry, Hillsborough and Monroe. See Appendix to 28 C.F.R. Part 51 (1991). The letter of the Attorney General specifically limited its decision to these five counties and did not address Section 2 violations elsewhere in the state. Juris. Statement App. 14

has occurred, and this Court will promptly undertake to make such reapportionment." Juris. Statement App. 16. The federal court continued to stay its hand until the state reapportionment processes was concluded.

On June 18, 1992, Defendant Chiles, the Governor, Defendant Wetherell, Speaker of the House, and Defendant Margolis, President of the Senate, advised the state Supreme Court of their decision not to convene an extraordinary apportionment session of the Florida legislature. See Juris. Statement App. 16-17. On June 19, 1992, the Florida Supreme Court declared a legislative impasse.

On June 23, 1992, the United States filed suit in the court below against the State of Florida alleging that the state's 1992 legislative redistricting plans diluted the voting strength of African-American citizens in Hillsborough County and in Escambia County, and the voting strength of Hispanic citizens in Dade County, all in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq.[7] The district court consolidated the complaint filed by the United States with the previously consolidated cases brought by the De Grandy Appellants and the NAACP. All three cases continued to be stayed pending conclusion of the state reapportionment process.

[7] United States v. Florida, et al., TCA 92-40220-WS.

II. Trial Proceedings In The District Court.

On June 25, 1992, in light of the legislative impasse[8] the Florida Supreme Court adopted a Senate redistricting plan that complied with the Attorney General's objection to Hillsborough County. In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992, 601 So. 2d 543 (Fla. 1992). This action concluded the facial review by the Florida Supreme Court.

Upon approval of the legislative plans by the Florida Supreme Court, the district court stay was lifted. See Juris. Statement App. 16. The De Grandy Appellants then filed a third amended complaint, alleging that the 1992 apportionment plan (SJR 2-G) violated Section 2 of the Voting Rights Act, specifically with regard to Hispanics in the Dade County districts contained in the Senate and House plan.

On June 26, 1992, the court below began hearing the Section 2 challenges in the consolidated cases,[9] incorporating by reference the evidence that had already been adduced in Judge Atkins's hearings on congressional redistricting. Juris. Statement App. 22. See Tr. I 37.

---

[8] "[W]e believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the legislature has declared that it is not going to do so." In re Constitutionality of Senate Joint Resolution 2G, 601 So. 2d, at 545.

[9] The court denied the motion of the De Grandy Appellants to limit the scope of its consideration to preliminary relief only. See Juris. Statement App. 13-14.

During the trial, the district court acknowledged that a hearing with regard to an appropriate remedy would follow a determination of liability:

> JUDGE VINSON: If we find there is, in fact, a Section 2 violation, then this [plan] becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to consider.
>
> Tr. III 123-124.
>
> JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy.
>
> Tr. III 126.

After five days of trial, the court found that, in the Dade County area, both the House and Senate plans violated Section 2. The court ruled that, "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." Juris. Statement App. 28. The court conducted a remedy phase of the case with regard to the House only and adopted as its remedy a

modified version of the House plan presented by the De Grandy Appellants.[10]

The state Senate redistricting plan enacted by the State of Florida (SJR 2-G) created seven Senate districts in the Dade County area, in three of which Hispanics comprise a majority of the voting age population.[11] At trial, the De Grandy Appellants proved that the state's plan fragmented the Hispanic community. The De Grandy Appellants also proved that, if the Dade County area were divided into equally populated Senate districts, which followed non-discriminatory plan-drawing criteria, Hispanics would constitute a voting age majority in one additional Senate district in the Dade County area.[12]

---

[10] These appellants raise no issue for appellate review with respect to the district court's order concerning reapportionment of the Florida House.

[11] In South Florida, SJR 2-G created a total of five minority-majority Senate districts.

Hispanic Majority Districts

District 34 (Dade)	66.3% HVAP
District 37 (Dade)	64.3% HVAP
District 39 (Dade)	76.1% HVAP

Black Majority Districts

District 36 (Dade)	52.5% BVAP
District 30 (Dade, Broward, Palm Beach)	51.7% BVAP

[12] In South Florida, Plan 275, submitted by the De Grandy Appellants, contained four Hispanic voting age population majority districts and two Black voting age population majority districts, with the

In analyzing the evidence presented, the district court applied the three-prong test set out in Thornburg v.

---

following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	71.5% HVAP
District 34 (Dade)	66.1% HVAP
District 35 (Dade)	55.0% HVAP
District 40 (Dade)	66.2% HVAP

Black Majority Districts

District 32 (Dade, Broward)	57.1% BVAP
District 36 (Dade)	57.3% BVAP

An alternative plan presented by Plaintiff Darryl Reaves, Plan 180, also created four Hispanic VAP supermajority districts (each slightly different from the De Grandy Appellants' plan) in which Hispanics constituted the following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	66.8% HVAP
District 34 (Dade)	65.0% HVAP
District 35 (Dade)	65.7% HVAP
District 40 (Dade)	62.1% HVAP

Black Majority Districts

District 32 (Dade, Broward)	58.8% BVAP
District 36 (Dade)	59.7% BVAP

See Juris. Statement App. 70.

Gingles, 478 U.S. 30 (1986),[13] as well as the totality of the circumstances analysis cited favorably in Justice O'Connor's concurring opinion in Gingles. The court concluded that the De Grandy Appellants had established a violation of Section 2. Juris. Statement App. 67. As a result, the court stated: "We must now fashion a remedy." Id. (emphasis added). Astonishingly, however, the district court declined to substitute a remedial plan in place of SJR 2-G and, totally contrary to the evidence upon which its finding of a violation was based, stated in its ruling from the bench:

> [T]he plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida. . . . Consequently, under Supreme Court precedent, this court must give deference to the state

[13] The minority group must be able to demonstrate:

1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances (such as the minority candidate running unopposed), usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 49-50.

> policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Juris. Statement App. 27-28. Immediately after the ruling, the court denied the De Grandy Appellants' motion for reconsideration and refused to consider their evidence of a remedy that would create four Hispanic supermajority districts without any regressive effect on Black voters.[14]

Following the district court's July 2 judgment, the House defendants applied to Justice Kennedy for a stay, pending their filing of a jurisdictional statement. The application was granted on July 17, 1992. See Stay Order, No. A-32. Accordingly, the November 3, 1992, election for Florida state House and state Senate members was held pursuant to SJR 2-G.

SUMMARY OF ARGUMENT

Upon finding violations of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, a district court has an equitable duty to render a complete remedy to cure those violations. This duty is based upon decisions of this Court affording remedies to statutory and constitutional violations, which have been codified in Section 2. In carrying out this duty, a district court should provide both an opportunity to the legislature to remedy the violations

[14] In addition to Plans 275 and 180, see note 12 supra, Plan 345, prepared by the Senate minority staff director for the De Grandy Appellants and submitted to the court in De Grandy's motion for reconsideration, created several additional remedial options for the court, including a plan that would have met the court's "ideal" remedy of four Hispanic minority districts with voting age populations of 65.3%, 64.0%, 60.0% and 69.2% and three Black districts with voting age populations of 52.5%, 55.3% and 52.3%.

identified as well as a hearing to determine whether the legislature's proposal itself completely conforms with federal law.

In the present case, the lower court, a three-judge panel, received extensive evidence of claims brought by a group of Hispanic citizens, by the United States of America and by a group of African-American citizens, that the legislative apportionment plan enacted by the State of Florida ("SJR 2-G") violated Section 2 of the Voting Rights Act. The district court found that violations existed with respect to both the state House and the state Senate reapportionment plans, ruling specifically that "vote dilution exists in Dade County in violation of Section 2 of the Voting Rights Act." The lower court then properly held a remedial proceeding to correct the violations found with respect to the House plan and, accordingly, imposed a remedial plan. The court, however, did not hold any remedial proceeding or consider any further evidence regarding the violations it found in the Senate plan. Instead of following the standard remedial procedures, erroneously imposed a plan previously found to violate federal law.

The lower court reached its erroneous conclusion not to conduct a remedial proceedings by determining, solely on the basis of evidence presented during the liability phase, that remedies for African-Americans and Hispanics were "mutually exclusive." This conclusion was reached despite the Appellants' proffer of a proposed remedial plan ("Plan 345") that created a sufficient number of minority Senate districts (four Hispanic and three African-American districts) to cure the violations identified by the court. The lower court's failure to consider this evidence and its failure to offer the state and the plaintiffs an opportunity to

address the violations constitute reversible error. Consequently, this case should be reversed and remanded to the lower court to conduct a proper remedial procedure. To correct this error, this Court should reverse the judgment below with regard to the Florida Senate and remand the case for further remedial proceedings.

ARGUMENT

III. UPON A FINDING OF A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT, A DISTRICT COURT MUST RENDER A COMPLETE REMEDY, PURSUANT TO THE REMEDIAL PROCEDURES AND STANDARDS ESTABLISHED BY THIS COURT TO ENSURE THAT FOURTEENTH AND FIFTEENTH AMENDMENT GUARANTEES ARE NOT EVISCERATED.

Both the rulings of this Court and the plain language of the Voting Rights Act ("the Act") and its legislative history require a district court to provide a complete remedy, if it finds a violation of the Act.[15] This Court

---

[15] The issues in this appeal are clearly distinct from other Voting Rights Act cases before the Court this term. Unlike Growe v. Emison, ___ U.S. ___, No. 91-1420 (February 23, 1993) (WESTLAW 42842 (U.S.Minn.)) (hereinafter Growe), the three-judge court here deferred action until the State reapportionment authorities had completed redistricting. Unlike Voinovich v. Quilter, 61 U.S.L.W. 4199 (U.S. March 2, 1993) (hereinafter Voinovich), the court below here affirmatively found a Section 2 violation in which both African-American and Hispanic communities could constitute a majority in additional districts. Unlike Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), appeal pending as Shaw v. Reno, No. 92-357, no issue has been raised of race-conscious gerrymandering in this case.

has established remedial procedures a lower court must follow when it finds a violation of the Act. A complete remedy has not been achieved if a proven violation that dilutes minority voting strength is allowed to continue to exist.

A. The equitable duty of a district court to provide a complete remedy for a violation of the Voting Rights Act is explicit in this Court's holdings, which have been codified in amended Section 2.

The 1982 amendments to Section 2 of the Voting Rights Act codify the remedial instructions this Court had previously given district courts to apply in fashioning remedies for constitutional violations of voting rights. "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965) (holding that certain voter qualification tests, as applied to minority citizens, violated the Fourteenth and Fifteenth Amendments). The Senate

Report[16] accompanying the 1982 amendments to Section 2 restated this maxim:[17]

> The court should exercise its traditional equitable principles to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

---

[16] This Senate Report has been recognized as an authoritative guide for determining legislative intent. Gingles v. Thornburg, 478 U.S. 30, 42 n.7:

> The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. . . . We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.

(Citations omitted.)

[17] See also U.S Code Cong. & Ad. News at 209 n.121; Louisiana v. United States, supra; Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977); Green v. County School Bd., 391 U.S. 430 (1968); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 42 (1971); In re Illinois Reapportionment, No. 81-C-3915 (1981), aff'd sub nom., Ryan v. Otto, 454 U.S. 1130 (1982).

S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 208 (emphasis added).[18]

This remedial philosophy -- that "any proposal to remedy a Section 2 violation must itself conform with Section 2" -- has likewise been followed in the Eleventh Circuit where the instant case arose. United States v. Dallas County Commission, 850 F.2d 1433, 1437, (11th Cir. 1988), citing Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987) and Edge v. Sumter County School District, 775 F.2d 1509 (11th Cir. 1985). Notwithstanding this clear remedial command, some district courts have expressed uncertainty concerning the standard by which a "complete" remedy is to be measured. See, e.g., McGhee v. Granville County, 860 F.2d 110, 118 n.8 (4th Cir. 1988). These uncertainties, however, relate to whether "influence districts" are required to achieve a complete remedy,[19] not to whether, as here, a district court can fail to eradicate proven illegal dilution by

---

[18] Amended Section 2 embodies a congressional purpose to remove all vestiges of minority race vote dilution perpetuated on or after the amendment's effective date by state or local mechanisms. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), citing S. Rep. 97-417, 97th Cong. 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 177, and H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981).

[19] The treatment of the remnants of the minority community, after the creation of all of the potentially "effective" single-member districts in which statistically significant racial bloc voting is present, remains unresolved. "We have not yet decided whether influence dilution claims . . . are viable under Section 2, Growe, 507 U.S. at ____ n.5; see Gingles, 478 U.S. 30, 46-47 nn.11-12 (leaving open the possibility of influence dilution claims); nor do we decide that question today." Voinovich v. Quilter, supra, at 4202.

ignoring clearly feasible minority/majority districts. The plain meaning of the statute is that, at a minimum, a complete remedy must prohibit the imposition of any practice or procedure found to deny or abridge the right to vote. 42 U.S.C. 1973(a).

In considering judicial remedies in redistricting cases even prior to the 1982 amendments, decisions of this Court recognized that federal courts must meet "higher standards" in adopting redistricting plans than apply to a plan crafted by a legislative body. Chapman v. Meier, 420 U.S. 1, 26 (1975). This higher duty is to insure that a court remedy is "free from any taint of arbitrariness or discrimination," Roman v. Sincock, 377 U.S. 695, 710 (1964), and that it will "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." Connor v. Finch, 431 U.S. 407, 425 (1977).

In Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), aff'd in part and reversed in part sub nom., Thornburg v. Gingles, 478 U.S. 30 (1986), a challenge to North Carolina's multimember legislative districts, the district court articulated the legal concept that dilutive voting practices shall not be retained, and cited its jurisprudential lineage:

> Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class as was here found, or in other ways. See In re: Illinois Congressional Districts Reapportionment Cases, No.

> 81 C 1395, slip op. (N.D. Ill. 1981), aff'd mem sub nom., Ryan v. Otto, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982); Rybicki v. State Board of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968, 98 S. Ct. 512, 54 L. Ed. 2d 454 (1977).

Id. at 376.

In a vote dilution case involving multimember districts, a district court measures whether a remedy is complete by dividing the former multimember district(s) into single-member districts, and then analyzing whether the submerged minority population has an "effective voting majority" in whatever number of newly drafted districts are justified by appropriate population criteria. See Thornburg v. Gingles, 478 U.S. 30 at 50 n.17; see also Meek v. Metropolitan Dade County, 908 F.2d 1540, 1547 (11th Cir. 1990). The same standard now applies in challenges to single-member districts as well. Growe, supra; Voinovich, supra. See also Gingles, 478 U.S. 30, 46 n.12.

As this Court pointed out only last month, the illegal practice or procedure found in single-member districting is "fracturing". "The usual device for diluting minority voting power is the manipulation of district lines," so that a politically cohesive minority is divided among various districts so that it is a majority in none. Voinovich, supra, at 4102. The remedial task facing a court in the case of fracturing is as straightforward as the remedial task facing a court in the case of submergence: to draft a plan that eliminates the illegal fracturing by including the minority population in newly-drawn, single-

member districts in which it constitutes a majority. See Gingles, 478 U.S. 30, 50 n.16.

In this case, the district court found a Section 2 violation because of fracturing, but failed to remedy the violation or even to hold a hearing to determine what remedies were available. Because the plain language of the statute and the holdings of this Court make it abundantly clear that a dilutive voting mechanism shall not be imposed,[20] it is error for a district court to maintain a voting mechanism that it has found violates Section 2. See Thornburg v. Gingles, 478 U.S. 30; see also United States v. Dallas County Commission, 850 F.2d 1433. The lower court's order -- permanently mandating election districts found to fracture a compact, cohesive minority group -- does not afford any relief, much less a complete remedy. This error of law compels reversal.[21]

---

[20] Section 2 provides in part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a).

[21] Moreover, the failure of the court to fashion a complete remedy, that is, one that eradicates proven violations rather than one that leads to the creation of new constitutional and statutory concerns, is also an abuse of discretion. See Chapman, 420 U.S.1, Roman, 377 U.S. 695, Connor, 431 U.S. 407.

B. This Court has established a remedial procedure for district courts to employ upon a finding of a Section 2 violation.

Since Reynolds v. Sims, 377 U.S. 533 (1964), this Court has developed standard procedures for district courts to follow when redistricting plans are found to violate federal law. Those procedures were stated clearly in Wise v. Lipscomb:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution . . . .
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation," Connor v. Finch, of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts "will be held to stricter stan-

> dards . . . than will a state legislature . . . ."

437 U.S. 535, 540 (1978) (citations omitted).

By following these approved procedures, a district court ensures that (1) proper deference is given to state authorities so that federal courts do not unnecessarily usurp state functions; (2) aggrieved minority communities have an opportunity to have proposed state plans judicially reviewed to determine compliance with federal law; and (3) there is no judicial error, and appellate review is possible, because an adequate record is developed. When a district court fails to follow the remedial procedures set by this Court, none of these safeguards is present.

As a result, district courts have traditionally conducted a two-phase proceeding: a liability phase, followed by a remedy phase, in the event liability is established. See, e.g., Gingles v. Edmisten, 590 F. Supp. 345. So clear and cogent is the approach taken by the Gingles three-judge court, it merits review here. The Gingles district court held two separate hearings and issued two separate opinions, the one addressing liability and the other, the appropriateness of the state legislative remedy. That district court thereby gave the state authorities the opportunity to correct the violation without abdicating its responsibility to ensure compliance with the duty to construct districts that did not dilute the voting strength of the protected class.

The Gingles district court relying upon White v. Weiser, 412 U.S. 783 (1973), allowed the state legislature an opportunity to devise new plans that would comply with

Section 2. United States Circuit Court Judge J. Dickson Phillips, writing for the Gingles district court, stated:

> Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class in the ways here found or in other ways.

Gingles v. Edmisten, 590 F. Supp. at 376 (citations omitted). Thus, the court declared that, in the event that the state failed to craft a remedy, the court would discharge its obligation to develop and implement an appropriate remedial plan. Id. Upon appeal of the Gingles decision, this Court tacitly approved the two-stage remedial approach that is now firmly embedded in the practice of district courts in Section 2 cases.[22]

In sharp contrast to the orderly procedure followed by the Gingles district court, the lower court in the instant case did not give the state Senate an opportunity to correct violations in its redistricting plan. Indeed, as a practical matter, the Senate could not and would not correct any violations until the court determined that violations existed. Furthermore, the lower court eliminated any incentive that the state Senate may have had to improve its plan by adopting the Senate plan as the permanent remedy. Finally, the district court did not afford the plaintiffs an opportunity to have proposed state plans judicially reviewed

---

[22] See, e.g., Meek v. Metropolitan Dade County, 805 F. Supp. 958 (S.D. Fla. 1992).

to determine compliance with federal law because it concluded, prematurely and erroneously, that an "ideal remedy" was not available. See Juris. Statement App. 77; Tr. VIII 53.[23] Upon reaching this conclusion, the district court compounded its error by reviving and implementing the state Senate plan -- the very plan it had just found to violate the Voting Rights Act. As a result, the clear violations of the Voting Rights Act found by the district court still exist in the present Florida state Senate plan.

Upon remand to the lower court for a remedial hearing, the Senate can be given the appropriate opportunity to cure those violations of Section 2 that have been determined. If, subsequently, the Senate fails to correct the violations of Section 2,[24] then, in that event, the plaintiffs

---

[23] See the discussion in Sections II.C and II.D, infra.

[24] Immediately prior to the beginning of the trial of this case in the court below, the Florida Supreme Court observed:

> As a consequence [of the Attorney General's Section 5 objection to the Hillsborough County portion of the Senate apportionment plan], this Court entered an order encouraging the Legislature to adopt a plan that would meet the objection of the Justice Department. However, the Court was advised that the Governor did not intend to convene the Legislature in an extraordinary apportionment session and the President of the Senate and the Speaker of the House of Representatives did not intend to convene their respective houses in an extraordinary apportionment session. Because it appeared that a legislative impasse had occurred, this Court determined to modify the Senate redistricting plan so as to resolve the objection of the Justice Department.

and other interested parties can present plans that do remedy those violations.

C. This Court has developed judicially manageable standards by which the completeness of Section 2 remedies can be measured.

This Court developed the three-pronged Gingles test to define a violation of Section 2, but it is also the measurement of whether a remedy is "complete." If the Gingles conditions remain even after a remedy is adopted, the court has not implemented a proper remedy because it will almost inevitably lead to new constitutional or statutory challenges. Connor v. Finch, 431 U.S. 407.

Specifically, the first Gingles prong is whether a minority group is "sufficiently large and a geographically compact" to comprise a majority in a single-member district. The definition of "sufficiently large" minority community within a "geographically compact" area is whether it is an effective voting majority. Gingles, 478 U.S. at 50 nn. 16, 17.[25] This definition is equivalent to that of cognizable "racial or political elements of the voting

---

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So. 2d 543, 544-545 (Fla. 1992) (emphasis added). Despite this history of the 1992 reapportionment process in the State of Florida, it is unclear whether the legislature would have remained unresponsive if it had been presented with a clear opportunity to correct the proven violation at a remedial hearing.

[25] An open question exists as to whether a majority group of less than 50% of the population of the district can, in certain circumstances, be "sufficiently large." Gingles, 478 U.S. 30 at 46 n.12. See note 19, supra and accompanying text.

population" articulated for constitutional litigation under Whitcomb v. Chavis, 403 U.S. 124, 143 (1971). This Court and other courts have used this standard to determine the existence of vote dilution. Growe, supra, at 42842 and 42843 n.5; Voinovich, supra, at 4101-102.

Since its articulation in Gingles, the effective voting majority test has also been used by the United States Attorney General in determining whether to preclear redistricting plans under Section 5 of the Voting Rights Act. See 28 C.F.R. §.51.55(b) (1991). Similarly, that test has been used by state redistricting authorities, and state courts drafting reapportionment plans, to insure their compliance with Section 2. See, e.g., Voinovich, supra, and Wilson v. Eu, 823 P.2d 545 (Cal. 1992).[26] In addi-

---

[26] As the Wilson court stated:

> We can avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of the three Thornburg prerequisites. The information from which our districts are drawn is furnished by the 1990 federal census, which tells us, as to each census tract, the total number of persons together with the numbers in particular categories of age, race and Latino origin. From that data, we can judge whether minority groups are "sufficiently large and geographically compact" to satisfy the first Thornburg prerequisite. The second and third prerequisites, however, depend upon what analyses of election results would show about a minority's political cohesiveness and about White majority bloc voting. . . .
>
> We have therefore drawn district lines so as to avoid either (1) unnecessary fragmentation of any sufficiently large, geographically compact protected minority group into two or more districts, or (2)

tion, other district courts have used the effective voting majority test to measure their own redistricting plans against this Court's remedial demands. See, e.g., Good v. Austin, 800 F. Supp. 557 (E. & W.D. Mich. 1992); Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. April 30, 1992); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 646 (N.D. Ill. 1991).

By leaving in place a redistricting plan that fragments a "sufficiently large" minority community as defined by Gingles, the court below failed to apply the first prong of the Gingles test. As a result, a plan is left in place in which white majority bloc voting usually defeats the candidate of choice of the minority community, which means the plan does not cure racial polarization, the third prong of the Gingles test.[27] Furthermore, a remedy that does not ameliorate the effects of white bloc voting cannot be "free from any taint of arbitrariness or discrimination." Roman v. Sincock, 377 U.S. 695. Finally, if, after remedy, one or more minority groups can still establish a prima facie case under Gingles, then the court has not avoided the creation of concerns that might lead to new

---

overconcentration of such a group in a single district. By thus preventing the dilution of the votes of any minority group that could qualify under the first Thornburg prerequisite, we can eliminate the possibility of section 2 challenges regardless of whether a group could fulfill the second or third prerequisite.

Wilson, 823 P.2d at 565.

[27] See note 13, supra and accompanying text.

constitutional challenges. See Connor v. Finch, 431 U.S. 407[28]

IV. THE DISTRICT COURT'S ABDICATION OF ITS REMEDIAL RESPONSIBILITY LED IT TO ADOPT AN ILLEGAL, DISCRIMINATORY STATE PLAN AND IGNORE THE FEASIBILITY OF AN "IDEAL REMEDY."

By not following the established remedial procedures, the District Court gave improper deference to an illegal legislative plan, failed to give the state an opportunity to correct proven violations, precluded aggrieved minority communities from the opportunity to test the state plan against the requirements of the Voting Rights Act and failed to develop a factual record upon which its conclusions could receive proper appellate review.

A. The district court's deference to the state plan that violated Section 2 of the Voting Rights Act was an error of law.

After finding Section 2 violations with respect to the state Senate,[29] the district court selected the

---

[28] These standards and a detailed explanation of the impact that they have on redistricting are contained in the Report to the Special Master adopted by this court during the congressional redistricting trial. See Report to the Special Master by the Independent Expert Witness 9-13.

[29] "[T]his court concludes that the plaintiffs have satisfied each of the three elements Gingles requires and that when considered together with the Senate factors, the "totality of the circumstances" show that with respect to Florida's Senate Plan, Hispanic and

legislature's plan -- the very plan it had just held to be unlawful -- as its remedy. The decision to maintain the state's plan was the result of a misconception or misapplication of this Court's preference for deferring to state authorities in developing remedial options. That misconception was rooted in the court's failure to follow the proper remedial procedure.

The proper deference that state authorities are given is twofold: first, the opportunity to address violations of federal law, of which the legislature was presumable unaware until the court's ruling in the liability phase and, second, a substantive deference to state authorities' political judgment in selecting a particular remedial plan. This second, substantive aspect of deference, however, is applicable if, and only if, the state-produced remedy complies with governing federal law.

For example, in Upham v. Seamon, this Court stated:

> [I]n the absence of any objection to the . . . districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative plan.

African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act.*

Juris. Statement App. 36 (emphasis added).

456 U.S. 37, 40-41 (1982) (emphasis added).

A court should defer to legislative judgments only when the state's political decisions are fully consistent with federal constitutional norms and, certainly, never when adherence to those decisions, as expressed in a legislative plan, would compromise the requirements of the federal constitution or statutes. "The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." White v. Weiser, 412 U.S. 783, 797 (1973). While a temporary plan may be used because of pending elections, there is no justification for imposing a permanent plan that is tainted by illegality.

The court precluded the state reapportionment authorities from addressing the violations that had been found. It is, therefore, impossible to know whether those authorities would have drafted a plan that both met state policy goals and was also consistent with federal law.

In lieu of using a straightforward procedure to examine numerous options, the court below, instead, unnecessarily restricted itself to choosing among the preliminary plans[30] that had been introduced during the liability phase solely for the purpose of making out a prima facia case. In the absence of a remedial phase where both the legislature and the aggrieved communities had the

---

[30] Redistricting plans produced by plaintiffs during the liability phase of a Section 2 trial are offered for the purpose of meeting the first Gingles requirement, that of sufficient size and geographic compactness to comprise a district. Such plans are not typically offered as potential remedies unless and until liability is established.

proper respective opportunities to develop remedial plans, the court's misconception of the application of the concept of deference[31] led it to impose an illegal plan, SJR 2-G.

The legal authority the lower court cites for its decision to defer to the state's Senate plan is DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992). The lower court's reliance on DeBaca for the proposition that it should defer to state political policy in the treatment of minority citizens is misplaced. The DeBaca court had found no Section 2 violation because of a lack of proof of cohesion among combined minority plaintiff groups and lack of polarized voting. Thus, the portion of the DeBaca opinion cited in the lower court's judgment is inapplicable to this case in which affirmative violations were established.

---

[31] Specifically, the court stated:

> We find that between all the plans presented to the court, the Florida Senate Reapportionment plan is the fairest to all the ethnic communities in Dade County and the surrounding areas, and is the proper remedy in this case. Consequently, this court gives deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court and imposes that plan as the remedy in this case.

Juris. Statement App. 81.

B. The District Court placed a novel burden of proof upon the appellants, which is not required by the Voting Rights Act.

In addition to proving the three Gingles preconditions, the district court's opinion places upon one group of plaintiffs the unprecedented burden of showing that the plans introduced during the liability phase for the purpose of making out a prima facie case will not weaken the electoral strength of other minority communities. In its ruling from the bench, the district court stated:

> [T]he plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Juris. Statement App. 27-28; Tr. VIII 53 (emphasis added).

This is error for at least two reasons. First, while retrogression is a legitimate concern in a remedy hearing, in contrast, during the liability phase, no party can respond to a court's remedial concerns until the court has determined whether a violation has been established. For example, until the court ruled from the bench, it was entirely unclear to all parties whether the NAACP had established a Section 2 violation.[32] Absent this finding of

---

[32] At the beginning of the trial, the district court precluded the NAACP plaintiffs from pursuing their own, independent claim that the state's failure to draw three majority black districts constituted a

a Section 2 violation with regard to the African-American community, the De Grandy Appellants (the Hispanic plaintiffs below) would have had to offer only a "four-two" plan, rather than a "four-three" plan.

In addition, the manner in which the remedy is drawn cannot be determined in advance of the liability finding. The district court's method failed to give the parties adequate notice or adequate opportunity to respond and be heard. Notwithstanding the foregoing, immediately upon issuing the court's liability ruling, the De Grandy plaintiffs proffered a "four-three" plan in connection with their motion for reconsideration, which was denied. In light of this offer of proof, the court's conclusion that a "four-three" plan was not feasible is incomprehensible and plain error.

C. There is no proper record evidence to support the District Court's conclusion that its "ideal" remedy -- the elimination of all dilution of both the Hispanic and African-American communities -- was not possible.

According to the findings of the district court below, the Hispanic (De Grandy) and African-American (Reaves/Humphrey, NAACP) plaintiff groups not only

---

Section 2 violation. The court, through District Court Judge Vinson, stated to counsel for the NAACP: "So we are going to limit your presentation of evidence solely to the issue of the regression effect upon the establishment of the fourth super-majority or majority Hispanic districts with regard to the regression that might have on the black districts." Tr. III 123.

established Section 2 violations, but also demonstrated the ability to draw proper remedial plans for their respective groups.

> The De Grandy/Reaves/Humphrey plaintiffs have established that four geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice. . . .
>
> The NAACP has established that three geographically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP majority districts. . . .
>
> This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida.

Juris. Statement App. 70, 72, 73.

Despite the foregoing findings, the district court concluded that, "[t]he evidence in this case, however, established that the ideal remedy for the Section 2 viola-

tions in this case is not a viable option." Juris. Statement App. 73. This conclusion is not supported by the record.

In fact, the court cited the following exchange between United States Circuit Court Judge Joseph W. Hatchett and John Gutherie, Staff Director of the Senate Committee on Reapportionment, purportedly to support the court's negative conclusion about the possibility of creating an ideal plan containing four Hispanic and three African-American districts:

> JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority Black districts?
>
> . . . .
>
> THE WITNESS: It's amazing, Your Honor, what you can do with these computers.
> . . .
>
> If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of -- because of numerosity -- of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that.
>
> JUDGE HATCHETT: You've answered my question.

Juris. Statement App. 73-74; Tr. IV 194-195. Thus, this statement, made by an expert witness called by the state Senate, actually indicated that the court's "ideal" four Hispanic, three African-American district plan could be drawn.

Similarly, the court also relied upon a statement of Mr. Charles Burr, counsel for the NAACP, in reaching the conclusion that four Hispanic and three African-American districts could not be drawn:

> MR. BURR: It is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable.

Juris. Statement App. 74; Tr. IV 217.[33]

Mr. Burr's unsworn statement not only lacks any evidentiary value, but also represents nothing more than his opinion of how the parties might view some potential "four-three" plan. As with Mr. Gutherie's statement, Mr. Burr's comment does not negate the possibility of drawing such a remedial plan. Neither statement provides any proper evidentiary support for the court's conclusion that a "four-three" plan could not be achieved.

In concluding that "ideal" Hispanic and African-American remedies would be mutually exclusive, the

---

[33] The court concluded that in order to draw an effective African-American district, a bare majority of voting age population was necessary; to draw a viable Hispanic district, a supermajority district of 59-60 percent might be necessary. Juris. Statement App. 69-72.

court's analysis included a critique of some of the plans submitted by the parties during the liability phase of the trial. None of the parties had any reason to know the court's concerns about plans that were offered for liability purposes. In fact, the court announced to all of the parties before the trial that they would have an opportunity to examine remedial plans if liability were established.

> JUDGE VINSON: If we find that there is, in fact, a Section 2 violation, then this [plan] becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to consider.
>
> Tr. III 123-124.
>
> JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy.

Tr. III 126.

Thus, the lower court initially recognized its clear duty to conduct a remedial hearing, but changed its course midstream. Because the district court did not conduct a full remedial proceeding, none of the parties had an opportunity to respond to the court's erroneous perception that the plans offered by the minority communities during the liability phase were "mutually exclusive," and the district court lacked a sufficient evidentiary basis for its conclusion that the "ideal" remedy was impossible.

D. The De Grandy Appellants presented a plan that provided a complete remedy.

The De Grandy Appellants proffered evidence of the ability to draw a practical, effective districting plan with four Hispanic and three African-American majority districts ("four-three" plan). This demonstrated that the court's "mutually exclusive" analysis was flawed. See Affidavit of Rockie Pennington, Juris. Statement App. 112-113. The De Grandy Appellants also moved for reconsideration of the court's remedial determination, based on their "four-three" Senate plan. This motion was denied.

Appellants' "four-three" Senate plan ("Plan 345") met all the population criteria adopted by the court below in its Gingles analysis during the liability phase.[34] Four Senate districts contained the following percentages of Hispanic voting age population: 65.3%, 64%, 60% and 69.2%. Plan 345 also created districts containing the following percentages of African-American voting age population: 52.5%, 55.3% and 52.3%.

Remedial Plan 345 removes any evidentiary basis for the conclusion that remedies for Hispanics and African-Americans were mutually exclusive. The court's failure to examine that plan was an abuse of discretion. During a properly conducted remedial hearing, Plan 345 (and other

---

[34] The district court found "that a district with an African-American majority VAP is an effective district which gives African-Americans a potential for electing candidates of their choice." Juris. Statement App. 43. The court also determined that Hispanic VAP of 60 percent would likewise be effective. Juris. Statement App. 48-49.

plans) could have been considered to ensure that the Section 2 violations were remedied.

CONCLUSION

For the reasons stated herein, the judgment of the lower court should be reversed and the case remanded to require the court below to conduct a proper remedial procedure.

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
***Counsel of Record**